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Craig H. Allen, Shipping Company Ordered to Pay Almost \$1M for Demoting Whistleblower, Pac. Mar., Sept. 2018, at 38-39.

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Shipping Company Ordered to Pay Almost \$1M for Demoting Whistleblower

By Craig H. Allen



Photo of the *M/V Horizon Trader* taken in March 2013 by tugster Will Van Dorp.

The US Department of Labor's (DOL) Administrative Review Board recently affirmed a DOL administrative law judge (ALJ) decision in favor of the former master of the *Horizon Trader* who had filed a complaint alleging that Horizon violated the Seaman's Protection Act by discharging him in retaliation for making protected safety reports to the US Coast Guard and American Bureau of Shipping. In *Loftus v. Horizon Lines, Inc.* (DOL ARB Case No. 16-082), the board upheld the ALJ's award of \$655,198.90 in back pay plus interest; \$10,000 in compensatory damages for emotional distress; \$225,000 in punitive damages, and an unspecified amount to cover the seaman's litigation costs and attorney's fees.

Seaman's Protection Act

The Seaman's Protection Act (SPA), enacted as part of the Coast Guard Authorization Act of 1984 and codified at 46 U.S.C. § 2114, prohibits an employer from retaliating against a "seaman" for engaging in certain protected activities pertaining to compliance with maritime safety laws and regulations. The DOL regulations define a "seaman" as any individual engaged or employed in any capacity on board a US-flag vessel or any other vessel owned by a citizen of the US.

Activities protected by the act include, among other things, providing information to the Coast Guard or other appropriate federal agency or department relating to a violation of maritime safety laws or regulations; cooperation with a safety investigation by the Coast Guard or the National Transportation Safety Board; refusing to perform duties ordered by the employer because the seaman has a reasonable

apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public; and accurately reporting hours of duty.

Prohibited "unfavorable employment actions" against a seaman who engages in protected activities include firing or laying off, blacklisting, demoting, denying overtime or promotion, disciplining, denying benefits, failure to hire or rehire, intimidation, making threats, reassignment affecting prospects for promotion, or reducing pay or hours.

A seaman discharged or otherwise discriminated against in violation of the SPA may file a claim with the DOL's Occupational Safety and Health Administration (OSHA) in accordance with 49 U.S.C. § 31105 (until 2010, such claims could be filed directly

in federal district courts). Complaints must be filed within 180 days of the alleged unfavorable employment action occurs. OSHA's findings may be appealed by either party to a DOL administrative law judge, the DOL Administrative Review Board, and the appropriate US Court of Appeals. Prevailing seamen may be awarded back pay with interest, compensation for special damages, punitive damages up to \$250,000, and litigation costs, including attorney's fees.

The Horizon Lines Claim

The claimant in this case, John Loftus, sailed as master for some twenty years, six of them on the *Horizon Trader*. At the time, the *Horizon Trader*, an 813-foot container ship, was operated by Horizon Lines, Inc. (in 2015 Horizon's assets were acquired by Matson Alaska, Inc.). On several occasions between October 2011 and February 2013 Loftus became frustrated with Horizon's reluctance to correct vessel safety discrepancies and contacted the Coast Guard and ABS. At an April 11, 2013, meeting with Horizon management, Loftus was criticized for his reports to the Coast Guard and ABS. On May 28, 2013, Horizon notified Loftus that he was being reassigned as a relief chief mate on the *Horizon Navigator*. Alleging that he was being demoted in retaliation for reporting the safety discrepancies, Loftus brought a claim under the SPA. Following a three day hearing, the DOL ALJ issued a 48 page decision and order, which among other things characterized Captain Loftus as "the most safety conscious Master in the entire Horizon Lines fleet." The ALJ concluded, "Loftus resorted to reporting safety concerns to the regulatory agencies because of Horizon's consistent failure to correct hazardous conditions aboard the *Trader*."

The ALJ ruled that the demotion constituted a constructive discharge in May 2013 and labeled Horizon's conduct "reprehensible," thereby justifying an award of \$225,000 in punitive damages. Horizon appealed the ALJ decision to the Administrative Review Board, which rejected Horizon's arguments. Applying the rule that a constructive discharge occurs when an employer creates "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign," the board affirmed that the demotion and transfer constituted a constructive discharge, entitling Loftus to back pay. In affirming the \$225,000 punitive damages award, the board explained that "a large punitive damages award was necessary to deter and punish Horizon given its longstanding inaction addressing Loftus's safety concerns, the chilling effect Horizon's retaliatory actions likely had on other marine employees, and the harm it visited upon Loftus personally."

An Important Precedent

Congress expressly extended whistleblower protections to seamen in 1984 following a contrary ruling by the US Court of Appeals for the Fifth Circuit. Although claims under the SPA have been relatively rare in the intervening years, this case will reassure seamen on US-flag or US citizen-owned vessels that they can come forward when a shipowner or operator fails to remedy vessel safety violations without fear of retaliation. The SPA's allowance for punitive damages and attorney's fees will also encourage attorneys representing seamen to seek out such cases. Despite the act's title as the Seaman's Protection Act, it should be noted that it extends to "any individual engaged or employed in any capacity on board a US-flag vessel or any other vessel owned by a citizen of the US." Moreover, the act is not restricted to large merchant vessels like the *Horizon Trader*. In fact, the implementing regulations define "vessel" as every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water". **PM**



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